worth only $2000. Under the suggested construction, the property would be held to be worth $2000, but the insured, who insured only his interest therein, would recover $667, the actual value of his interest. This would seem to be more consistent with both the purpose of the statute, and the principle of indemnity upon which insurance is based.

P. E. S.

INSURANCE — SUBROGATION OF INSURANCE CO. TO CLAIMS AGAINST THE TORT FEASOR

In many kinds of insurance a company which has paid a claim under the policy may maintain an action against the tort feasor who was responsible for the loss. While the policy often expressly provides for subrogation, the right exists without a contract and is said to be based upon dictates of equity and conscience.[1] Among those policies which provide for subrogation of the insurer to the rights of the insured, including those in the form of the New York standard, the insured's rights must be measured solely on the terms of such provisions.[2] Subrogation is a basic doctrine of suretyship and its extension to insurance was founded on the principle that insurance is a contract of indemnity.[3] Consequently the rationale of the courts in determining whether such a right exists is to tag a particular type of insurance indemnity, or non-indemnity protection. Hence it has been applied without question to fire insurance.[4] Since the right of subrogation grows out of the principle of indemnity, it follows that the insurer is not entitled to subrogation until he has paid the insured's claim or until the insured has been fully indemnified for his loss. The recent Ohio case of *McConnell* v. *Conway*[5] concluded, "an insurer, having paid the amount of a policy issued on a building destroyed by an incendiary, will not be subrogated to the claim of the insured against the wrongdoer, unless and until the insured has been indemnified fully for his loss." This is illustrative of the court's reliance upon the relation of subrogation to indemnity and its use as a vehicle for problems arising under this doctrine.[6] Although there have

[1] *Am. Central Ins. Co.* v. *Weller*, 106 Or. 494, 212 Pac. 803 (1923).

[2] *Home Ins. Co.* v. *Hartshorn*, 128 Miss. 282, 90 So. 1 (1922); *Williams & Miller Gin Co.* v. *Baker Cotton Oil Co.*, 108 Okla. 127, 235 Pac. 185 (1925).

[3] *Newcomb* v. *Cincinnati Ins. Co.*, 22 Ohio St. 382, 10 Am. Rep. 736 (1872); *Phenix Ins. Co.* v. *Pennsylvania R.R. Co.*, 134 Ind. 215, 20 L.R.A. 405, 33 N.E. 970 (1892); PATTERSON, ESSENTIALS OF INSURANCE LAW, (1935) p. 119.

[4] *Baltimore Am. Underwriters of Baltimore Am. Ins. Co. of N. Y.* v. *Beckley*, 195 Atl. 550 (Md., 1937); *Norwich Union F. Ins. Soc.* v. *Stang*, 18 Ohio C.C. 464, 9 Ohio Cir. Dec. 576 (1897); *Sun Oil Co.* v. *Ohio Farmers Ins. Co.*, 15 Ohio Cir. Ct. 355, 8 Ohio Cir. Dec. 145 (1898).

[5] 62 Ohio App. 335, 23 N.E. (2d) 970, 15 Ohio Op. 508 (1939).

[6] *Svea Assur. Co.* v. *Packham*, 92 Md. 464, 48 Atl. 35, 52 L.R.A. 95 (1901).

been various other theories advanced explaining subrogation,[7] the courts have favored this justification and as a consequence deny this right when no loss would have fallen on the insured, although the insurer has paid.[8] It follows that if the loss is not covered by the policy or falls within an exception the insurer cannot recover on the basis of subrogation.[9]

Subrogation will be applied in all forms of fidelity insurance. If the company agrees to reimburse an employer for defalcations by employees, it may, of course, maintain a claim against the wrongdoer.[10] In fact, these surety bond cases offer one of the clearest illustrations for applying this equitable doctrine. Likewise, the principle will be applied in burglary and theft insurance; since the type of insurance and not the article involved determines the question, an insurance company which has insured an automobile against theft (and fire) may maintain an action against the party responsible for the loss.

Life insurance, with a basic difference in organization, has generally been construed to be of the non-indemnity variety and it follows that the principle of subrogation has not been applied.[11] It should be noted, however, that life insurance is not entirely free of indemnity features; the payment of a sum of money, to make up to some extent for the loss of income upon the death of the bread winner, is not unlike indemnity. Nevertheless, it is often said that life insurance is more in the nature of an investment,[12] and courts have taken notice of the fact that if the insured lives out his expectancy the amount paid in premiums and accumulated interest thereon will be greater than that returned to the beneficiary.[13] Furthermore, in most branches of insurance the event insured against is contingent, whereas in life insurance death is certain and only the time is uncertain. Among certain authorities[14] and in some states,[15]

[7] VANCE, INSURANCE (2d ed.) p. 681 is of the opinion that the basis of the carrier's action is not subrogation but directly the negligence of the third party—since loss to insurance company was forseeable.

[8] *Aetna Life Ins. Co.* v. *Middleport*, 124 U.S. 534, 8 S.Ct. 625 (1887); *McKinnon* v. *N. Y. Assets Realization Co.*, 217 Fed. 339, 133 C.C.A. 255 (1914).

[9] *Scandinavian, etc., Ins. Co.* v. *C. B. & Q. Ry. Co.*, 104 Neb. 258 (1920).

[10] *Huff* v. *Rosen*, 121 Misc. 674, 201 N.Y.S. 689 (1923). The insurance company is not subrogated to the employer's rights, however, until it has actually paid the loss, *Am. Sur. Co.* v. *Palmer*, 240 N.Y. 63, 147 N.E. 359 (1925).

[11] *Dalby* v. *India & London Assur. Co.*, 15 C.B. 365, 139 Eng. Rep. 465 (1854).

[12] *Gatzweiller* v. *Milwaukee Electric Co.*, 136 Wis. 34, 116 N.W. 633 (1909); *Scott* v. *Dixon*, 608 Pa. 6, 56 Am. Rep. 192 (1884).

[13] MACLEAN LIFE INS. (5th ed., 1939), p. 101 *et seq.*, p. 59 *et seq.*, where it is demonstrated that payment of premiums plus interest on premiums total a greater sum than benefit or cash surrender value.

[14] RICHARDS, INS. LAW (3d Ed., 1912), p. 124 states that life insurance is a contract of indemnity; the amount always being fixed in advance.

[15] PATTERSON, ESSENTIALS OF INS. LAW, (1935) p. 132—"in Texas a life insurance contract is treated for some purposes as a contract of indemnity. In a few other states, Alabama, Kansas, Kentucky, Missouri, Pennsylvania, and Virginia, one finds traces of the indemnity theory."

one finds traces of the indemnity theory applied to life insurance, but not even in these states has subrogation been granted.

Much the same reasoning leads the courts to deny subrogation to the insurer against personal injury or death by violent and accidental means, *i.e.* accident insurance.[16] In *Mercer Casualty Co.* v. *Perlman*,[17] the Ohio Court found that "the insurer in a policy of accident insurance which contains no provision for subrogation of the insurer, having paid a loss by reason of accidental injuries to the insured, is not subrogated to the rights of the insured to claim damages from a third person whose negligence caused the injuries." While it is probably true that in practice the indemnity features of the accident insurance contract are more significant than in life insurance, the amount payable by the insurer is fixed by the terms of the contract and not by an assessment of the actual loss suffered and as a consequence the denial of subrogation to an accident insurer has seldom been questioned.[18]

Workmen's Compensation Acts generally provide subrogation rights for the insurance carrier against third persons liable for the injury suffered.[19] Even in the absence of such a provision in the Act, the courts, as a whole, have given the carrier similar rights.[20] A Texas court in Texas Employer's Liability Act failed to provide for subrogation; by virtue of the Revised Statute of 1925, Article 8307, a compensated insurer is subrogated to the rights of an injured employee against any third person.[22] One court in an action involving the Illinois Workmen's Compensation Act held that the policy effected by employers protecting themselves against loss arising out of or resulting from injuries to its employees, in the course of their employment, to be of the nature of an accident insurance policy and stated that unless the policy is made expressly an indemnity contract the insurer is not subrogated to the rights of the insured.[23] However, the weight of authority leaves little doubt that a contractual provision is not necessary to vest this right.[24]

[16] *Suttles* v. *Railway Mail Ass'n.*, 156 App. Div. 435, 141 N.Y.S. 1042 (1913); *Aetna Life Ins. Co.* v. *Parker*, 30 Tex. Civ. App. 521, 72 S.W. 621 (1902).

[17] 62 Ohio App. 133, 23 N.E. (2d) 502 (1939).

[18] *Independent Eastern Torpedo Co.* v. *Harrington*, 95 S.W. (2d) 377, (Texas, 1936).

[19] *Dahn* v. *Hines*, 254 U.S. 627, 41 S.Ct. 147, 65 L.Ed. 446 (5 U.S.C.A. para. 751 *et seq.*, 1922); *Mass. Bonding and Ins. Co.* v. *San Francisco Term. Rys.*, 39 Cal. App. 388, 178 Pac. 974 (1919) (California Workman's Compensation Act, 1913, para. 31); *Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N.Y. 273, 146 N.E. 377, 29 A.L.R. 826 (1925) (N. Y. Workmen's Compensation Law, para. 29); Sec. 2 Schneider, Workmen's Compensation Law (1939), para. 466, p. 1189.

[20] *Travelers Ins. Co.* v. *Great Lakes Eng. Co.*, 184 Fed. 426, 107 C.C.A. 20 (1911). 1918[21] was unable to find any basis for extending the right when the

[21] *City of Austin* v. *Johnson*, 204 S.W. 1181 (Texas, 1918).

[22] *Fidelity Union Casualty Co.* v. *Texas Power and Light Co.*, 35 S.W. (2d) 782 (Texas, 1931).

[23] *Marshall-Jackson Co.* v. *Jeffrey*, 167 Wis. 63, 166 N.W. 647 (1918).

[24] *Busch & L. Painting Co.* v. *Noerman Constr. Co.*, 310 Mo. 419, 276 S.W. 614

Besides fire and theft insurance, as heretofore mentioned, the common types of automobile insurance are liability, property damage, and collision. Liability and property damage may be distinguished with regard to the losses for which they purport to indemnify the insured; liability covering damage to the person of another, while property damage covers damage to the property of another.[25] In each type of policy, the company promises only to indemnify the insured and it need pay no damages for injury to the third party unless the insured was at fault[26] Hence there is little need for any doctrine of subrogation here; if the insured is not at fault the company will pay nothing; if the insured is at fault neither he nor his company is likely to have a claim against another.

In collision insurance, the company agrees to indemnify the insured for damage to his own car. Here subrogation applies; if a company has paid the amount of the damage, and the wrongful act of a third party was the cause of the loss, an action may be maintained against this tort feasor.[27] Collision insurance, damage to one's own car, may be compared to accident insurance, damage to one's person, since it involves benefits to the assured with or without a causal relation raising a liability to be indemnified; despite this similarity, subrogation has not been allowed in accident insurance.

In *Mercer Casualty Co.* v. *Perlman*,[28] one Dewey Roe, the driver of a school bus, had an automobile liability policy with the plaintiff; to this policy a school bus accident policy was attached as a rider, the premium being paid by Roe. A pupil, while leaving the bus, was struck by a car driven by defendant, and plaintiff, having paid the amount of the accident policy to the estate of the deceased, seeks to recover this sum from the defendant. No negligence was found on the part of Roe, and payment was not made on the basis of the liability policy, but rather on the coverage of the accident indorsement; in accident insurance there is no subrogation, and the fact that the accident rider was attached to a liability policy and was paid for by the driver offers no sufficient reason for taking the case out of the rule. Since subrogation plays little part in determining the premiums charged in insurance coverage and has been

(1925); *Sanders* v. *Frankfurt M. A. & P. G. Ins. Co.*, 72 N.H. 485, 101 Am. St. Rep. 688, 57 Atl. 635 (1904).

[25] KULP, CASUALTY INS. (4th Printing, 1939), p. 300. See this author for an interesting account of all automobile coverage.

[26] *Davies* v. *Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, L.R.A. 1916 D. 395 (1916).

[27] *Allen & A. A. Renting Co.* v. *United Traction Co.*, 91 Misc. 531, 154 N.Y.S. 934 (1915).

[28] See note 17, *supra*.

termed a "windfall to the insurer,"[29] it is submitted that the court was correct in refusing to extend the doctrine of subrogation to cover this situation. D. D.

INSURANCE — TOTAL AND PERMANENT DISABILITY IN LIFE INSURANCE

The insured had a policy of life insurance which provided for the payment of disability benefits and waiver of premiums in the event he "has become totally and permanently disabled and will for lifetime be unable to perform any work or engage in any business for compensation or profit." He was afflicted with ulcers at the age of fifty-nine, while employed as a roll-superintendent of a steel corporation. By reason of the affliction he was confined to his bed for a number of months and was only able to return as a watchman for three or four weeks and was forced to discontinue this because of fatigue. The Supreme Court sustained the Court of Appeals[1] and held that the provision would not be taken literally, allowing the insured to recover benefits for total and permanent disability.[2]

The use of the disability clause in life insurance is comparatively new; the regular life companies did not adopt it generally until 1907.[3] The clause was added for a nominal cost and became a very good selling point. However, its legal interpretation has caused a great deal of difficulty and has been one of the major problems of life insurance companies.[4] Unlike death, which is one of the most unequivocal of insured events, or even fire which has only occasionally given rise to litigation, total and permanent disability is not unambiguous and is capable of several interpretations. If strictly interpreted it would seem to deny benefits to all except the absolutely helpless.[5] Such an interpretation would

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[29] PATTERSON, ESSENTIAL OF INS. LAW (1935), p. 122—Patterson weighs the necessity for the doctrine of subrogation.

[1] *Gibbons* v. *Metropolitan Life Insurance Co.*, 62 Ohio App. 280, 15 Ohio Op. 594, 23 N.E. (2d) 662 (1938).

[2] *Gibbons* v. *Metropolitan Life Insurance Co.*, 135 Ohio St. 481, 21 N.E. (2d) 588 (1939).

[3] First policies (life) containing this clause appeared in Germany in 1876 and in American Fraternal Orders in the following year. It appeared in regular life companies in United States in 1896 but not generally till 1907 and thereafter. HUNTER, TOTAL AND PERMANENT DISABILITY BENEFITS IN RELATION TO LIFE INSURANCE (1920) p. 1.

Mutual Life Insurance Co. in 1896 was the first life company in United States to adopt it. GEPHART, INSURANCE (1917) Vol. 1, p. 174.

[4] Insurance company will also face other hazards. Insured may pretend to be more seriously incapacitated than he really is and the prospect of a long rest at the expense of the company may psychologically retard his recovery. Insured's mental attitude may prolong the insured event and continue physical disability. Insured's income also has a bearing on these risks, if the amounts payable are comparable to or more than his earnings.

[5] *Ohio National Life Insurance Co.* v. *Stagner*, 231 Ky. 275, 21 S.W. (2d) 289; *Prudential Insrance Co.* v. *South*, 179 Ga. 653, 177 S.E. 499 (1934).